SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969
No. 292

MILFORD FULLER ..... *Petitioner*

v.

STATE OF ARKANSAS ..... *Respondent*

REPLY TO BRIEF IN OPPOSITION AND SUPPLEMENTAL BRIEF

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STATEMENT

Petitioner, Milford Fuller, deems it necessary to reply to the Brief of Respondent, State of Arkansas, in opposition, and also finds it necessary that his original petition be supplemented because of the recent decision of *North Carolina* v. *Pearce*, 395 U.S. 711 89 S. Ct. 2072 (1969).

ARGUMENT

As to questions presented I and II below, Petitioner will reply in sequence to the statements and arguments made by Respondent on those points. As to question presented No. III, Petitioner wishes to supplement his original arguments by citation and discussion of *North Carolina* v. *Pearce, supra.*

I

The Respondent seeks to distinguish the present case from the case of *Bumper* v. *North Carolina,* 391 U.S. 543, by saying "that case can be readily distinguished from the case at bar. In *Bumper,* the consent to search relied upon was to search for the very articles and the very place named in the invalid search warrant. In the present case the articles seized and the place that was searched were not named in the invalid search warrant."

Where Respondent gets this view we are unable to state, for the warrant in the *Bumper* case was never produced for the record, 391 U.S. 543, 550, Note 15. Respondent's contention does not coincide with the facts in the present case either.

The invalid search warrant appears both in the record and in detail in the opinion of the Arkansas Supreme Court in *Walton* v. *State,* 245 Ark. 91, 431 S.W. 2d, 462 (1968) (Appendix "B" of Petition). It contains all inclusive language concerning the locations to be searched, and speaks of "the premises now being occupied by said Golden Rich Distributing Co., Inc., a corporation and its officers . . . " All the television sets, including the television set and the stereo here involved, were found in interconnecting rooms in the same building, and hence

were found in the very place named in the invalid search warrant. Respondent's distinctions do not exist in fact, and even if they did, would not constitute reasonable or adequate grounds to reach a different result than that reached in *Bumper*.

Petitioner is unable to answer the questions as to why the Arkansas Supreme Court ignored the plainly applicable rule enunciated in *Bumper*, which was repeatedly urged upon it by him, and why that Court instead used the "bootstrap" method to sustain the conviction, holding that the dicta in its first opinion was the law of the case for the second opinion.

The Arkansas Supreme Court reversed Petitioner's first conviction in *Walton* v. *State*, 245, Ark. 91, 243 S.W. 2d, 462 (1968), but in dicta stated that the television and the stereo in question here were not the product of an illegal search and seizure. The trial court, taking the Arkansas Supreme Court at its word, allowed in evidence the television and the stereo. The Arkansas Supreme Court on the second appeal in *Fuller* v. *State*, 246 Ark. 681, 439 S.W. 2d 801 (1969) affirmed the case upon the authority of its dicta from the previous case, in spite of the decision in *Bumper*.

The Respondent, State of Arkansas, would place the burden upon a criminal defendant to appeal every lower court decision if it contained any unfavorable dicta. This would place an unnecessary load on the docket of the Supreme Court of the United States and financial burden upon criminal defendants; and efficient justice would not be served in the process.

The United States Supreme Court's supremacy in the decision of Federal Constitutional questions such as pre-

sented here is too well settled to permit argument at this time; and the Arkansas Supreme Court must yield and conform despite its previous decisions or dicta, and can not find shelter behind such phrases as "our decision there becomes the law of this case". U. S. Constitution Article 6, Clause 2.

II

Respondent, State of Arkansas, seeks to distinguish the case of *Fahy* v. *Connecticut*, 375 U. S. 85, by stating "in the present case the confession was not a direct and proximate result of an illegal search and seizure under an invalid search warrant". Again, the facts do not support the Respondent.

The day following the search, Petitioner was questioned in detail concerning all the items seized with the invalid search warrant; and statements were thereby obtained from him (R.226). The causation in this case is classic: confrontation into confession, "Please explain your possession of these stolen goods." The essential facts of the present case are so similar to those in *Fahy* as to make inescapable the conclusion that the entire statement should have been suppressed under the doctrine enunciated in that case.

Respondent has asserted that the requirements of *Miranda* v. *Arizona*, 384 U.S. 448 were met with regard to the Petitioner. Suffice it to say that the totality of circumstances (Petitioner being confronted with illegally seized evidence, being confronted with an array of officers in a small room, failing to clearly indicate a knowledgable waiver of his rights at the outset of questioning, later refusing to sign a written waiver and indicating a desire

for counsel) all negate a meeting of the "heavy burden" requirement of the *Miranda* case.

III

Since the filing of Petitioner's Petition for a Writ of Certiorari, the case of *North Carolina* v. *Pearce*, 395 U.S. 711, has been decided. Under that decision, Petitioner's sentence of ten years, after the reversal of his first conviction and sentence of four years, is not ipso facto invalid. We read that opinion, however, as a mandate that an increased sentence be justified on the record. We quote from *North Carolina* v. *Pearce, supra,* as follows: "In order to assure the absence of such a motivation [vindictiveness], we have concluded that whenever a Judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear * * * And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal * * * Nonetheless, the fact remains that neither at the time the increased sentence was imposed upon Pearce, nor at any stage at this Habeas Corpus procedure, has the State offered any reason or justification for that sentence beyond the naked power to impose it".

Likewise, Respondent, State of Arkansas, has not in its brief in opposition, nor at any other time, offered one single reason or justification for the additional six years imposed upon Petitioner at his second trial.

Respondent, State of Arkansas, instead of trying to justify Petitioner's increased sentence, endeavors to argue that *North Carolina* v. *Pearce, supra* is distinguishable

because that opinion deals only with Judge-imposed sentences. Under Respondent's view of the *Pearce* ruling, States such as Arkansas, which permit the jury to assess the penalty at the same time it determines guilt, would, to a large extent, escape the force of the *Pearce* ruling. Thus, in rural areas across the nation, juries (which in such areas may be as knowledgable as Judges about what previously happened in a certain case) might be permitted to accomplish what the *Pearce* case prohibits.

Also we would note that the Arkansas procedure on the juries' determining guilt and punishment in a single verdict is presently before the United States Supreme Court on certiorari at the present time. See *Maxwell v. Bishop*, No. 622, 393 U.S. 997, 89 S. Ct. 488 (1969).

Because there are States such as Arkansas with the single-verdict procedure, the Supreme Court should grant certiorari in the present case so that the *Pearce* holding can be interpreted and explained in its effect on those states with the single-verdict procedure.

CONCLUSION

Premises considered, the arguments of respondent, State of Arkansas, in opposition to the granting of a Writ of Certiorari, are without merit; for the foregoing reasons and the reasons set forth in the original petition; petitioner prays that the Writ of Certiorari be granted.

Respectfully submitted,

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